

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

FABIAN VAKSMAN,  
Plaintiff,  
v.  
MICHAEL W. WYNNE, Secretary,  
Department of the Air Force,  
Defendant.

No. CV-07-225-FVS

**ORDER GRANTING SUMMARY  
JUDGMENT**

MICHAEL W. WYNNE, Secretary,  
Department of the Air Force,  
Defendant.

**THIS MATTER** comes before the Court based upon cross motions for summary judgment. The plaintiff is representing himself. The defendant is represented by Assistant United States Attorney Andrew S. Biviano and Captain Shawn Tabor.

## BACKGROUND

Fabian Vaksman suffers from Attention Deficit Hyperactivity Disorder ("ADHD"). The Department of the Air Force ("Air Force") conditionally hired Mr. Vaksman as a civilian historian and assigned him to Fairchild Air Force Base ("Fairchild"). In order to keep his job, he had to successfully complete two years of probation and the Air Force's Civilian Historian Orientation Course. The latter is offered at Maxwell Air Force Base ("Maxwell"). He began the course during the last week of February of 2005. While studying at Maxwell, he stayed in a local motel. Despite receiving multiple offers of assistance from his instructors and fellow students, and despite

1 accepting some assistance from them, he failed the course. He checked  
2 out of his motel on March 19th. During the process, he antagonized  
3 motel employees to the point that the general manager sent a letter of  
4 complaint to one of his instructors. When Mr. Vaksman returned to  
5 Fairchild, he antagonized an Air Force sergeant to the point that she  
6 complained to her superiors. On April 18, 2005, the Air Force fired  
7 him. He filed a complaint with the Equal Employment Opportunity  
8 Commission ("EEOC") alleging that the Air Force discriminated against  
9 him on the basis of a disability, *viz.*, ADHD. The EEOC assigned his  
10 complaint to an investigator. Both before and after filing the  
11 complaint, he sent a number of contentious emails to various Air Force  
12 personnel. One of the emails is dated July 11, 2005. In it, he  
13 describes a certain Air Force officer as the "epitome of evil. . . .  
14 We have to throw this ANTI-INTELLECTUAL TRASH out of the AF history  
15 program before its too late . . . ." (Defendant's Statement of  
16 Material Facts (Ct. Rec. 72), Exhibit AA (capitals in original.)) Mr.  
17 Vaksman did not stop there. He also says, "Do NOT deny this  
18 unconstitutional scum its Constitutional due process! The God-damned  
19 traitors and cowards must be SHOT for their assault on The First  
20 Amendment and rot in hell . . . ." *Id.* (capitals in original). The  
21 EEOC investigator concluded that Mr. Vaksman had presented  
22 insufficient evidence of disability discrimination to qualify for  
23 relief. He requested review by an EEOC Administrative Judge ("AJ").  
24 After considering the materials submitted by the parties, the AJ ruled  
25 that Mr. Vaksman had failed to establish a *prima facie* case of  
26 disability discrimination. This action followed. The matter comes

1 before the Court based upon cross motions for summary judgment.

2 **RULING**

3 In order to state a prima facie case under the Rehabilitation Act  
4 of 1973, Mr. Vaksman must offer evidence indicating that (1) he is a  
5 person with a disability, (2) who is otherwise qualified for  
6 employment, and (3) suffered discrimination because of his disability.  
7 *Walton v. United States Marshals Service*, 492 F.3d 998, 1005 (9th  
8 Cir.2007). It is questionable whether Mr. Vaksman is a disabled  
9 person. Although his ADHD can be controlled with medication, and  
10 although he could have taken medication during the Civilian Historian  
11 Orientation Course, he chose not to do so. See *Sutton v. United Air  
12 Lines, Inc.*, 527 U.S. 471, 482, 119 S.Ct. 2139, 2146, 144 L.Ed.2d 450  
13 (1999) ("if a person is taking measures to correct for, or mitigate, a  
14 physical or mental impairment, the effects of those measures -- both  
15 positive and negative -- must be taken into account when judging  
16 whether that person is 'substantially limited' in a major life  
17 activity and thus 'disabled'"). Furthermore, even if Mr. Vaksman is  
18 disabled, he is not "otherwise qualified" to work for the Air Force as  
19 a civilian historian. His emails and other writings are a matter of  
20 record.<sup>1</sup> Mr. Vaksman's writings contain insulting and belligerent  
21 statements, some of which are violent in nature.<sup>2</sup> In view of these,

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23 <sup>1</sup>In evaluating the defendant's summary judgment motion, the  
24 Court has not considered those oral statements and behaviors that  
the defendant attributes to Mr. Vaksman but which he disputes.

25 <sup>2</sup>Mr. Vaksman has filed a number of letters with the Court  
26 since commencing this action. Several contain inflammatory  
accusations.

it is clear that he lacks the interpersonal skills and judgment necessary to serve the Air Force as a civilian historian.

**IT IS HEREBY ORDERED:**

1. Mr. Vaksman's motion for summary judgment (**Ct. Rec. 18**) is denied.

2. The defendant's motion for summary judgment (**Ct. Rec. 70**) is granted.

3. Mr. Vaksman's claims against the defendant are dismissed with prejudice.

4. The Court will not entertain a motion for reconsideration.

**IT IS SO ORDERED.** The District Court Executive is hereby directed to file this order, furnish copies to the plaintiff and to counsel for the defendant, enter judgment accordingly, and close the case.

**DATED** this 5th day of September, 2008.

s/Fred Van Sickle  
Fred Van Sickle  
Senior United States District Judge